

**Queensland Government's Submission to the Commonwealth Parliamentary Joint Committee on Intelligence and Security inquiry into the Counter-Terrorism Legislation Amendment Bill (No.1) 2015**

Queensland supports the measures proposed in the Counter-Terrorism Legislation Amendment Bill (No.1) 2015 (the Bill).

Queensland recognises that the terrorism threat level for Australia is currently assessed as 'Probable', meaning credible intelligence indicates that individuals or groups have developed both an intent and capability to conduct a terrorist attack in Australia.

Queensland also acknowledges the changing nature of the threat of terrorist attacks across the globe, but also in Australia. Younger people are increasingly being targeted for recruitment by terrorist organisations, particularly in online forums.

In this changing environment of the threat of terrorism, it is important that Australia has effective operational and legislative responses and it is on this basis that Queensland supports the Bill.

Whilst supporting these measures, Queensland would also like to express concerns about the drafting of some of the provisions as they apply to children, as well as the role of the Public Interest Monitor (PIM) in applications for warrants to monitor compliance with control orders.

Queensland's issues with the Bill relate to the following areas:

1. Service of control orders on 14 – 17 years olds
2. Mandatory conditions for tracking devices ordered for 14 – 17 year olds
3. The role of the Queensland Public Interest Monitor (PIM) in monitoring compliance with control orders.

**1. Service of Control Orders on 14 – 17 year olds**

Queensland refers to the lowering of the age limit so that control orders can be made against children aged 14 – 17 years of age. As mentioned above, Queensland is aware of the current terrorism threat and understands the impetus for lowering the age. Queensland supports the additional safeguards for children in the Bill, including the child's right to an advocate to represent the young person's best interests to the court, and the requirement for an issuing court to take into account the best interests of the child.

Queensland's concerns relate to the proposed provisions for an Australian Federal Police (AFP) officer to serve a copy of a control order on the parents/guardians of children aged between 14 and 17 years of age who are the subject of a control order. Queensland has concerns that this service is only required where it is reasonably practical to do so and there is no positive duty to serve a copy of the control order on the young person's parents/guardians.

Whilst it is acknowledged that not all parents or guardians will be actively involved in the life of a young person engaged in a terrorist activity, it is critical that there be a positive duty on the state to inform the parents/guardians, especially given that control orders will apply to people as young as 14 years of age.

Queensland's view is that the requirement should be framed in terms of a positive obligation, that is, that a copy of the order must be served on the young person's parents/guardians, except if not reasonably practicable to do so.

This increased onus should be reflected in similar wording in all proposed provisions relating to the service of control orders on a person who is 14 to 17 years of age including:

- item 13 which adds subsection (c) (ii) at the end of subsection 104.12A(2)
- item 14 which adds subsection (v) at the end of 104.12A(4)(b)
- item 23 which adds subsection (4) at the end of section 104.17
- item 27 which inserts subsection (2A) after subsection 104.19(2)
- item 30 which repeals and substitutes subsection 104.20(3) with a new subsection 104.20(3)
- item 33 which repeals and substitutes subsection 104.23(3) with a new subsection 104.23(3)
- item 40 which adds subsection (5) at the end of section 104.26

## **2. Tracking Devices and Mandatory Conditions for 14 – 17 year olds**

Queensland has concerns with the mandatory nature of additional conditions that must be applied when courts order that a tracking device must be worn as part of a condition of the control order.

Item 1 of Schedule 3 of the Bill inserts subsection (3A) after subsection 104.5(3) to provide that if the court imposes a requirement that the person (subject to a control order) wear a tracking device, then the court must also impose on the person by the order a requirement that the person do a number of things listed in subsection 3A.

A breach of the conditions will constitute an offence with a maximum penalty of 5 years imprisonment.

Queensland acknowledges that it is important that effective measures are in place to ensure compliance with control orders and supports the amendments in so far as they relate to adults.

However, Queensland has concerns that the court will have no discretion to amend the conditions that would apply in the event a tracking device is ordered to enforce a control order for a child. These mandatory conditions do not allow the court to consider the particular circumstances of a child, including whether it is appropriate, or in fact possible, for the child to comply with the mandatory conditions.

For example, one of the mandatory conditions of the tracking device order is that if the subject of the order becomes aware that the tracking device or any equipment necessary for the operation of the tracking device is not in good working order, they must notify an AFP member no longer than 4 hours after becoming so aware. This mandatory condition could be very difficult for a 14 year old child to comply with if they are required to contact the AFP while they are at school.

One of the other mandatory conditions proposed will require the subject of the tracking device to take steps to ensure that the tracking device and any equipment necessary for the operation of the device are or remain in good working order.

Queensland submits that young people may be more likely to negligently damage or fail to maintain equipment due to their developmental life stage. This could be relevant in relation to a young person's failure to charge a device, when a particularly immature 14 year old may not understand (or remember) the significance of ensuring this simple action occurs (and, by failing to do so, they may be committing a criminal offence).

Control orders are not intended to be a punitive measure as no offence has yet been committed. Queensland notes the potential ‘net widening’ effect of bringing a person within the ambit of the criminal justice system for an act that may be committed for relatively innocuous reasons.

Queensland also has concerns with serious criminal sanctions being applied in circumstances where a young person could inadvertently fail to comply with mandatory conditions attached to an order for a tracking device.

Queensland submits that there should be no mandatory conditions the court is required to impose when making an order for a tracking device for children aged between 14 and 17 years of age. The court should continue to be empowered to make appropriate conditions that consider the particular circumstances of the child.

### **3. The Role of the Queensland Public Interest Monitor**

The Bill will enable law enforcement agencies to obtain search warrants, telecommunications interception warrants, and surveillance device warrants for the purposes of monitoring compliance with the conditions and restrictions imposed by a control order.

Queensland acknowledges there is a need to expand capabilities to monitor a person’s compliance with control orders to be able to monitor online activity and telephone conversations, especially given the increasing online focus of terrorist organisations. Queensland also supports the continued powers for courts to make these kinds of orders.

Given the potential impacts these warrants will have on a person’s privacy, Queensland considers it would be appropriate for the Queensland Public Interest Monitor (PIM) to have a role in applications for all warrants to monitor compliance with control orders.

The PIM currently has a role in applications for control orders. Continuing this role in applications for warrants to monitor compliance with control orders would provide consistency across all Commonwealth legislation and would also be in line with current Queensland legislation.

#### **Telecommunications interception (Schedule 9)**

Schedule 9 already proposes to include a role for the Queensland PIM in applications for telecommunications interception warrants made pursuant to the *Telecommunications (Interception and Access) Act 1979*.

Queensland notes that submissions by the Queensland PIM are considered by a Court when applications are made by Queensland interception agencies for telecommunications service warrants. Item 19 inserts three new subsections into section 46 in relation to telecommunications service warrants. These proposed subsections permit the issue of a telecommunications service warrant or ‘B party’ warrants relating to persons subject to a control order and provide that in considering an application for such a warrant, the Judge or nominated AAT member must be satisfied of a number of factors (listed in subsection 46(4)) and must have regard to a number of other factors (listed in subsection 46(5)), including – in relation to an application by an interception agency of Queensland – any submissions made by the Queensland PIM.

This factor will also be required to be taken into account in relation to named persons warrants under subsection 46A(2) as inserted by item 22(2B)(h).

Queensland considers that the same role of the Queensland PIM should also be included in applications for search warrants for the purposes of monitoring compliance with a control order (as proposed in Schedule 8), and for applications for surveillance device warrants (as proposed in Schedule 9).

### **Search warrants monitoring of compliance with control orders etc. (Schedule 8)**

Schedule 8 will create a new search warrant regime for the purposes of monitoring compliance with a control order. This Bill provides no proposed role for the Queensland PIM in applications for such search warrants.

Schedule 8 will create a “monitoring warrant” regime by inserting a new Part 1AAB in the *Crimes Act*. Unlike the existing search warrant regime, the new regime will not require the issuing authority (a Magistrate) to be satisfied that an offence has already occurred or is going to be committed. Rather, this regime will be targeted at monitoring compliance with the conditions of a control order for the purposes of preventing a person from engaging in planning a terrorist act or engaging in a preparatory act (refer to para 399 of Explanatory Memorandum).

Whilst Queensland understands the gravity of the purposes for which the control order is made and that compliance with its terms is clearly important, its view is that this broadening of grounds for granting a search warrant requires appropriate safeguards to be in place. As such, Queensland submits that the Bill should be amended to require that where a monitoring warrant is applied for by an agency in Queensland, the issuing authority must have regard to any submissions made by the Queensland PIM. This would be in line with the provisions proposed for the role of the PIM provided for in applications for telecommunications interception warrants (discussed above).

Item 3ZZOA(2) creates a list of factors an issuing officer must be satisfied of before he/she may issue the warrant. Queensland considers that in order to create a role for the Queensland PIM, a new subsection should be added to the proposed Item 3ZZOA(2) to require that before issuing the warrant, the issuing officer must have regard to – in relation to an application by an interception agency in Queensland – any submissions made by the Queensland PIM.

Given that this power will be a covert power, Queensland considers that another provision should be inserted to allow for “deferred reporting” arrangements which would permit the PIM to defer public reporting as required by section 743(3) of the Police Powers and Responsibilities Act (Qld) 2000 (the PPRA).

The PPRA requires the PIM to report annually with respect to Division 104 of the *Criminal Code Act* (control orders). The deferred reporting provision would allow the PIM to report on the use of monitoring warrants in a subsequent report so as to avoid revealing the existence of any covert warrants which may still be in place at the time the annual report is due.

It is noted that these “deferred reporting” arrangements are already proposed in Schedule 10 in relation to surveillance device warrants to permit the chief officer of an agency to defer public reporting on the use of a surveillance device warrant in certain circumstances, “balancing the public interest in timely and transparent reporting with the public interest in preserving the effectiveness of this covert power” (refer to para 600 Explanatory Memorandum).

Queensland considers that deferred reporting powers for the PIM be inserted into Schedule 8 using similar wording to subsection 50A(2) (as inserted by Items 35 and 36 of Schedule 10) to determine when these arrangements should apply

### **Surveillance device warrants (Schedule 10)**

Queensland considers it would also be appropriate for the PIM to have a role in applications for surveillance device warrants sought pursuant to the *Surveillance Devices Act 2004*.

Item 1 of Schedule 10 amends the *Surveillance Devices Act 2004* by inserting new paragraphs 3(aa) and 3(ab) which will allow law enforcement officers to apply to an issuing authority for a surveillance device warrant for the purposes of monitoring compliance with a control order made under Division 104 of Part 5.3 *Criminal Code Act*.

Queensland submits that the Bill should be amended to require that before issuing a surveillance device warrant, issuing authorities must have regard to – in relation to an application by an interception agency of Queensland – any submissions made by the Queensland PIM. This would be in line with the provisions relating to the role of the PIM already provided for in applications for telecommunications interception warrants (discussed above).

As noted in relation to Schedule 8 (search warrants), given that this power will be a covert power, Queensland considers that another provision should be inserted to allow for “deferred reporting” arrangements which would permit the PIM to defer reporting required by section 743(3) of the *Police Powers and Responsibilities Act (Qld) 2000* (the PPRA).

As noted above, the PPRA requires the PIM to report annually with respect to Division 104 of the *Criminal Code Act* (control orders). The deferred reporting provision would allow the PIM to report on the use of surveillance device warrants in a subsequent report so as to avoid revealing the existence of any covert warrants which may still be in place at the time the annual report is due.

It is noted that these “deferred reporting” arrangements are already proposed in Schedule 10 to permit the chief officer of an agency to defer public reporting on the use of a surveillance device warrant in certain circumstances, “balancing the public interest in timely and transparent reporting with the public interest in preserving the effectiveness of this covert power” (refer to para 600 Explanatory Memorandum).

Queensland considers that deferred reporting powers for the PIM be inserted into Schedule 10 using similar wording to subsection 50A(2) (as inserted by Items 35 and 36 of Schedule 10) to determine when these arrangements should apply.

### **Conclusion**

The Queensland Government thanks the Parliamentary Committee for the opportunity to provide this submission as part of their inquiry into the Counter-Terrorism Legislation Amendment Bill (No.1) 2015.